

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
November 17, 2017**

The meeting was called to order at 9:10 a.m. in the Hoff Lounge, Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, Anne Damone, James Dumont (by telephone), Jean Giddings (by telephone), Karen McAndrew (by telephone), Hon. Dennis Pearson, and Hon. Helen Toor (by telephone). Also present were Hon. Harold E. Eaton, Supreme Court liaison; Megan Shafritz, Attorney General's designee (by telephone); and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The minutes of the meeting of September 29, 2017, were unanimously approved as previously circulated.

2. Status of recommended, proposed, and pending amendments.

A.-D. Professor Wroth reported that

A. #15-7. The Committee's recommended amendments to the certificate of service provisions of new V.R.C.P. 5(h) were promulgated on July 14, effective September 18, and reviewed without comment by the Legislative Committee on Judicial Rules, on October 23, 2017.

B. #10- 5. The Committee's recommended amendments to conform discovery and other rules to Federal Rules amendments were promulgated on July 14, effective September 18, and reviewed without comment by the Legislative Committee on Judicial Rules, on October 23, 2017.

C. #17-3. The Committee's recommended permanent amendment of V.R.A.P. 11(b)(3), promulgated as an emergency amendment on March 9, effective April 10, 2015, was made permanent by order of October 17, effective December 18, 2017, and reviewed without comment by the Legislative Committee on Judicial Rules, on October 23, 2017.

D. The Court's amendments to the Vermont Code of Judicial Conduct 1994, A.O. 10, Canon 4, §§ H(2), I, were sent out for comment on April 24, with comments due on June 23, and promulgated on October 17, 2017, effective on December 18, 2017. The Judicial Conduct Board's amendment to the Vermont Code of Judicial Conduct 1994, A.O. 10, Application Section B(1)(b), was sent out for comment on December 7, 2016, with comments due on February 6, 2017, and promulgated on October 17, 2017, effective on February 1, 2019. These amendments will be incorporated in the pending draft of the Vermont Code of Judicial Conduct 2018. See item 9 below.

E. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4). Sent out for comment on January 11, with comments due on March 13, 2017. The Committee reviewed Professor Wroth's revised draft of V.R.C.P. 16.2 and 26(b), (e), with Reporter's Notes, reflecting actions

taken at the September 29 meeting, and his alternative draft of V.R.C.P. 26(b)(4), both dated October 12, 2017. The alternative draft was intended to restore the distinction between retained or employed experts with no personal knowledge and fact witnesses who are also experts, with less onerous disclosure requirements for fact witnesses. It was moved and seconded to adopt the full revised draft. It was moved and seconded to amend the main motion by substituting the alternative draft for the provisions of Rule 26(b)(4). The motion to amend failed by a unanimous vote. In discussion, Professor Wroth agreed to further revise the revised draft to include the amendments of Rule 26(b) adopted effective September 18, 2017, and to clarify the meaning of “expert” by specifying in the Reporter’s Notes that it means a witness qualified under V.R.E. 702-705. After discussion of the nature of the comments on the previous proposed draft and the nature of the changes made in the present revised draft, on motion duly made and seconded, there being no further discussion, it was voted unanimously to request the Supreme Court to send out for comment the October 12 revised draft of V.R.C.P. 16.2 and 26(b), (e), with the agreed further revisions and appropriate changes in the Reporter’s Notes.

F. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Civil and other Rules to federal rules amendments (“day is a day” rules), promulgated September 20, 2017, effective January 1, 2018. Professor Wroth reported that proposed further amendments of V.R.C.P. 80.6 and 80.9, made at the request of the judge of the Judicial Bureau, were sent out for comment on October 18, with comments due on November 27, 2017. Chairman Keyes reported that one comment had been received from the clerk of the Judicial Bureau. Justice Eaton agreed to determine whether the on-line forms are being changed to conform to the day is a day amendments and to ask the clerk and judge of the Judicial Bureau to confer on the filing and default times proposed in the amendments.

G. Proposed amendment to V.R.C.P. 45, sent out for comment on October 18, with comments due on December 18, 2017. Chairman Keyes reported that December 2016 amendments to V.R.Cr.P. 17 had provided that a subpoena must be issued by a judicial officer and had provided expressly for a subpoena duces tecum. The Criminal Rules Committee is presently considering a further amendment to V.R.Cr.P. 17 that will allow a subpoena to be issued by a clerk or a judge in blank, or by a member of the Vermont bar, and that a subpoena may be issued by a judicial officer in a proceeding before him or her. Chairman Keyes will meet with the Chair and Reporter of the Criminal Rules Committee in January to discuss the possible elimination of differences between V.R.C.P. 45 and V.R.Cr.P. 17, making clear the view of the Civil Rules Committee that there should not be a requirement that a judge sign a subpoena.

H. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Ms. Badgewick and Professor Wroth reported that the Special Committee’s final draft of proposed V.R.C.P. 79.2 was being prepared for circulation to the procedural rules committees and that a proposed order containing V.R.C.P. 43.1 and related rules concerning video and audio appearance had been sent to the Supreme Court on October 30 with a request that it be sent out for comment.

I. V.R.C.P. 80.11, promulgated June 15, effective August 15, 2016; amended July 11, effective September 12, 2016, with Committee to review and report no later than August 15, 2018, whether the rule should be revised or made permanent. Chairman Keyes stated that he would pursue the Committee’s request that the Court Administrator provide further survey data by March 2018. It was agreed that this item should remain on the agenda.

J. Proposed amendments to V.R.P.C. 1.7 and 1.8. Sent out for comment on October 18, 2017, by the Professional Responsibility Board, with comments due on December 18, 2017. The

Committee agreed that it did not wish to take a position on the proposed amendments, but that individual members were free to make comments as members of the Bar.

3. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement.

Judge Toor will present a final draft at the next meeting,

4. # 17-1. Allocation of residual class action funds. In the necessary absence of Mr. Weimer, Mr. Avildsen presented their recommendations to amend V.R.C.P. 23(e) and add a new V.R.C.P. 23(f) providing a process and standards for disposition of funds remaining in a class action judgment after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements. On motion duly made and seconded, after discussion, it was voted unanimously to request the Supreme Court to send the proposed amendments t out for comment.

5. #s16-7/17-5. Addition of "prisoners' mailbox" provision to Civil Rules.

Chairman Keyes noted that, as reported at the June 16 meeting, the Legislative Committee on Judicial Rules had had no comment on the prisoners' mail box rule promulgated as V.R.A.P. 4(f), effective March 13, 2017. The Committee then considered Professor Wroth's March 22, 2017, drafts of proposed amendments adding V.R.A.P. 25(a)(2)(C) and V.R.C.P. 3(b). Professor Wroth noted that although proposed V.R.A.P. 25(a)(2)(C) appears to duplicate new V.R.A.P. 4(f), he added drafted it because similar duplicative amendments to F.R.AP. 4(c) and 25(a)(2)(C) had been adopted effective December 1, 2016. In discussion of proposed V.R.C.P. 3(b), in consideration of the questions whether such a rule was needed at the trial court level and if so, whether it should cover filings other than complaints, Committee members noted that there should be a provision in V.R.C.P. 5, because most prisoner filings were not complains, but that it would be desirable to have a rule governing complaints, particularly in view of issues raised by the housing of prisoners in out-of-state prisons with differing systems. Ms. Shafritz stated that the Attorney General's office had no objection to a rule or rules. Professor Wroth agreed to prepare drafts of amendments to V.R.C.P. 3 and 5 for the next meeting.

The Committee considered the proposal of Emily Tredeau, Prisoners' Rights Staff Attorney in the office of the Defender General, for an amendment to clarify and simplify service of prisoners' complaints raising confinement issues on the Attorney General. In discussion, it was agreed that the question appeared to be one of best practices under 13 V.S.A. §§ 5233(a)(3), 7133, which were differently interpreted in different courts. Judge Toor agreed to ask the Civil Division Oversight Committee to confer with Ms. Tredeau and Ms. Shafritz and refer the issue back to the Civil Rules Committee only if it appeared that a rule was required to resolve the problem.

6. #17-4. Review status of amendments to V.R.A.P. 24 (IFP Proceedings). The Committee considered Mr. Avildsen's November 16, 2017, report. The Committee on December 3, 2014, had recommended the promulgation of an amendment adding V.R.A.P. 24(a)(1)(B)(iii) to provide that, for purposes of an *in forma pauperis* finding, income of the applicant's cohabiting family members was to be deemed income of the applicant. In a letter of July 2, 2015, Justice Eaton had advised the Committee that the Court requested it to reconsider the amendment proposal because it was inconsistent with V.R.C.P. 3.1(b)(1) and that one member of the Court

was prepared to dissent to promulgation of the rule on the ground that the “cohabiting family member” provision of both the Civil Rule and the recommended Appellate Rule raised Constitutional issues. Mr. Avildsen suggested that the phrase as used in both rules was ambiguous and confusing and that, more substantively, it was inappropriate to consider resources of an individual with no legal obligation to the applicant and difficult to make such a determination on a consistent basis. In discussion, Committee members agreed that the term was ambiguous and at best too broad. Mr. Avildsen agreed to provide drafts of both V.R.C.P. 3.1(b) and V.R.A.P. 24(a)(1) to address these issues at the next meeting.

7. #17-6. V.R.C.P. 11. Application to self-represented litigants; remedial sanctions.

The Committee considered the request of Rep. Martin LaLonde in an e-mail of November 10, 2017, to Chairman Keyes that the Committee consider whether V.R.C.P. 11(c)(2) should and could be amended not only to provide sanctions for violation of the rule focused on deterrence but also to provide compensation ensuring that the party harmed by a violation is compensated for costs and fees incurred due to the violation and Rule 11 litigation. In discussion it was suggested that there should at least be consideration of providing compensation to self-represented litigants for their time. Chairman Keyes and Professor Wroth will review rules and practice in other states and report at the next meeting.

8. #14-8. V.R.C.P. 69. Executions. It was agreed to defer consideration of Professor Wroth’s draft amendment dated March 22, 2017, until the next meeting and to place the item higher on the agenda.

9. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Professor Wroth will present a full draft with Reporter’s Notes at the next meeting.

10. #14-1. Status of Appendix of Forms. Ms. Blackwood and Professor Wroth will review Ms. Blackwood’s December 2015 memorandum on necessary forms and report at the next meeting.

11. #17-2. Incorporation of V.R.E.F. 4(g) in V.R.C.P. 7(b) or 78(b). Professor Wroth will send Ms. McAndrew minutes of the Family Rules Committee’s consideration of Judge Gerety’s proposal of April 17, 2017. She will report at the next meeting.

12. Next meetings. The next meeting is scheduled for January 26, 2018. It was agreed to schedule a further meeting for March 30, 2018. Professor Wroth will circulate proposed May 2018 meeting dates to the Committee.

There being no further business, the meeting was adjourned at 11:45 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter